



**Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Worldwide Services, Inc./Perry Management Corporation, a Joint Venture

**File:** B-261113

**Date:** August 18, 1995

Kenneth Fontes and Howard J. Perry, Sr., for the protester.

Jay P. Manning, Esq., Defense Commissary Agency, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Agency improperly rejected proposal, without performing technical evaluation, based on absence from initial proposal of a signed certificate of procurement integrity; properly executed certificate could have been obtained from protester prior to award if the protester was determined to be the successful offeror.

### DECISION

Worldwide Services, Inc./Perry Management Corporation, a Joint Venture, protests the rejection of its offer under request for proposals (RFP) No. DECA01-95-R-0027, issued by the Defense Commissary Agency (DCA) for shelf-stocking, custodial and storage and holding area operations services at Holloman Air Force Base Commissary. Worldwide argues that the agency improperly rejected its initial proposal for failing to include a signed certificate of procurement integrity.

We sustain the protest.

The RFP called for fixed-price offers to perform various commissary support services for a base year and three 1-year option periods. Award was to be made to the responsible firm submitting the lowest-priced, technically acceptable offer; technical acceptability was to be evaluated on the basis of numerous factors specified in the RFP. DCA received 19 offers, 4 of which, including Worldwide's, it rejected as unacceptable. DCA rejected the protester's initial proposal without further technical evaluation because the certificate of procurement integrity (Federal Acquisition Regulation (FAR) § 52.203-8) was unsigned.

Worldwide argues that the certificate could have been signed any time up to award, and that rejection of its proposal for this reason therefore was improper. The agency maintains that its actions were proper, since the certificate imposes legal obligations on offerors and obtaining a

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signature therefore would have constituted discussions. Noting that discussions were never contemplated, and that offerors should have been aware from the terms of the RFP that executed certificates were to be included with initial proposals, DCA asserts that rejection of the proposal was proper.

The certificate of procurement integrity imposes legal obligations on a bidder or offeror to which it would not otherwise be bound. Mid-East Contractors, Inc., 70 Comp. Gen. 383 (1991), 91-1 CPD ¶ 342. The FAR thus defines submission of a properly executed certificate as a matter of responsiveness in a sealed bid procurement, and the failure of a bidder to provide one with its bid cannot be cured after bid opening. FAR §§ 3.104-9(b)(3)(i)(A) and 52.203-8(c)(3); Mid-East Contractors, Inc., *supra*.

However, the rule is different for negotiated procurements. Specifically, the FAR states:

"For procurements . . . made using procedures other than sealed bidding, the signed certification shall be submitted by the successful offeror to the contracting officer within the time period specified by the contracting officer when requesting the certificates. . . . In no event shall the certification be submitted subsequent to award of a contract. . . ."

FAR §§ 3.104-9(b)(3)(ii) and 52.203-8, alternate I.<sup>1</sup>

While this provision refers to the "time period specified by the contracting officer" as the time for submission of the certificate, it is clear from reading the provision as a whole that the certificate is to be requested and submitted after the successful offeror has been identified. Since the "successful offeror" cannot be determined until proposals have been submitted and evaluated, and discussions, if necessary, have occurred, the regulation envisions that the executed certificate will be submitted after these things have taken place, and then only by the successful offeror.<sup>2</sup> (In contrast, in sealed bidding, all bidders must submit the certificate. FAR § 3.104-9(b)(3)(i)).

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<sup>1</sup>The FAR also distinguishes between traditional sealed bid procurements and two-step sealed bid procurements; in the latter type of acquisition, bidders are only required to submit an executed certificate with their step-two sealed bid, and are not required to submit it with their technical proposals. FAR § 3.104-9(b)(3)(i)(A).

<sup>2</sup>The certificate itself requires the offeror to make representations concerning events occurring throughout the entire acquisition process; the certifying company official must specifically represent that he or she is aware of no violations or possible violations of the Act "occurring during the conduct of [the] procurement." FAR § 3.104-4(c)(1) in turn states that this phrase specifically includes the conduct of negotiations. Permitting the certificate to be furnished just prior to award—that is, after all steps of a negotiated acquisition, including discussions, have been completed—is consistent with the purpose of the certificate.

DCA's position that it will be required to open discussions with all offerors if it allows Worldwide to submit a properly executed certificate--even though negotiations would not otherwise be necessary or required--is incorrect. While DCA is correct that a properly executed certificate is a necessary element of an acceptable proposal, the reference to "successful offeror" in the FAR and the clause essentially creates a regulatory exception to the general rule that an agency is required to engage in discussions with all competitive range firms when it obtains from one firm information necessary to establish the acceptability of the firm's proposal. Since proposal evaluation and discussions with offerors, if held, necessarily must be concluded before a "successful offeror" can be identified, and since the regulation envisions that it is the successful offeror who submits an executed certificate, it follows that the regulatory scheme does not contemplate that obtaining the certificate would constitute discussions.

This conclusion is consistent with the fundamental principle that all offerors must be treated equally by the procuring agency; at the time the executed certificate is submitted, the acceptability of all offers from a substantive standpoint will have already been determined, the successful offeror will not be permitted to revise any aspect of its proposal, and no change to the evaluation results will occur. Consequently, no firm is prejudiced by this certificate submission process established by the FAR.

This conclusion is also consistent with the nature of negotiated procurements. In a sealed bid procurement, allowing the apparent successful bidder to execute the certificate after bid opening may provide the firm a competitive advantage--the bidder could take the bidding results into consideration in deciding whether to execute the certificate. See S.J. Amoroso Construction Co., Inc. v. United States, 981 F.2d 1073 (9th Cir. 1992). In a negotiated procurement, on the other hand, this is not a concern as offerors have no knowledge of the competing firms or their prices.

Accordingly, we conclude that DCA erred in rejecting Worldwide's proposal. The proposals should have been evaluated, and if Worldwide was ultimately identified as the successful offeror, it should have been asked to submit an executed certificate at that time.

In view of the foregoing, we sustain Worldwide's protest. Accordingly, by separate letter of today to the Director of the Defense Commissary Agency, we are recommending that the agency evaluate Worldwide's proposal and, if the firm is found to be the apparent successful offeror, provide it the opportunity to submit a properly executed certificate of procurement integrity. We also find Worldwide entitled to the costs of filing and pursuing its bid protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1995). Worldwide should submit its certified claim for these costs, detailing the time expended and the costs incurred, to the agency within 60 days of its receipt of our decision. 4 C.F.R. § 21.6(f).

**The protest is sustained.**

**Robert P. Murphy for  
Comptroller General of the United States**